



The following constitutes the order of the Court.  
Signed: November 21, 2018

*William J. Lafferty, III*

William J. Lafferty, III  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

In re	)	Lead Case No. 12-41283 WJL
	)	Chapter 13
Stephen G. Oppewall,	)	
	)	Adversary Proceeding No. 18-04090
Debtor.	)	
<hr/>		
Stephen G. Oppewall,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Bank of America, N.A.,	)	
Brian T. Moynihan, David E.	)	
Pinch, Mark Joseph Kenney,	)	
Severson & Werson, P.C.,	)	
	)	
Defendants.	)	
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**MEMORANDUM OF DECISION REGARDING MOTION TO ABSTAIN AND/OR  
REMAND, MOTION TO DISMISS, AND MOTION FOR SANCTIONS**

These matters came for hearing on August 8, 2018 and  
September 5, 2018 on (a) the Motion to Dismiss Adversary Proceeding  
("Motion to Dismiss"), filed by Bank of America, N.A. ("BANA"),  
(b) the Motion for Sanctions, also filed by BANA, and (c) the

1 Cross-Motion by Plaintiff to Remand and/or Abstain (the "Motion to  
2 Abstain/Remand") filed by Stephen Opperwall ("Opperwall"). Bernard  
3 A. Kornberg of the law firm Severson & Werson, P.C. appeared for  
4 BANA; Opperwall appeared for himself. At the conclusion of the  
5 September 5 hearing, the Court took the matters under submission,  
6 subject to requesting further information from BANA with respect to  
7 its transmittal to Opperwall of the Motion for Sanctions in the  
8 manner required by Federal Rule of Bankruptcy Procedure 9011(c)  
9 (for convenience, any Rule of the Federal Rules of Bankruptcy  
10 Procedure will be referred to as "Rule"), and with respect to the  
11 calculation of attorneys' fees sought pursuant to the Motion for  
12 Sanctions; after further consideration, the Court is satisfied that  
13 it has sufficient information to make a ruling, and does not need  
14 any further affirmative information concerning the Motion for  
15 Sanctions, though the Court will allow Opperwall a short  
16 opportunity to comment only with respect to the amount of fees  
17 requested in the Motion for Sanctions.<sup>1</sup>

18 For the reasons stated below, the Court determines (a) that it  
19 has jurisdiction to determine the Motion to Dismiss and the Motion  
20 for Sanctions, (b) that there is no just cause for the Court to  
21 abstain from hearing the Motion to Dismiss (or the Motion for  
22 Sanctions) or to remand back to state court the adversary  
23 proceeding that is the source of those motions, (c) that the Court  
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26 <sup>1</sup>As noted in Section II.D, *infra*, an order on the above  
27 motions will follow ten (10) days after entry of this Memorandum of  
28 Decision to allow Opperwall a brief window of time to file an  
opposition to the amount of sanctions requested by BANA.

1 should grant the Motion to Dismiss, without leave to amend, and (d)  
2 that the Court should grant the Motion for Sanctions.<sup>2</sup>

3  
4 <sup>2</sup>Since this matter was commenced in state court, the complaint  
5 did not reference Plaintiff's position regarding this Court's  
6 authority to enter a final order in the matter, or Plaintiff's  
7 consent to such judicial power, as referenced in Bankruptcy Local  
8 Rule ("BLR") 7008-1. For similar reasons, the Motion to Dismiss  
9 also did not refer to the Court's judicial power or Defendant's  
10 consent to the Court's entry of a final order. The Court raised  
11 this issue at the September 5 hearing, and indicated that there may  
12 not have been a simple uniform answer to the question of the  
13 Court's judicial power to enter final orders in these matters, in  
14 light of the different sorts of issues presented (jurisdiction,  
15 abstention and remand, dismissal under Rule 12(b)(6), and sanctions  
16 under Rule 9011). In response to the Court's inquiry, BANA  
17 indicated that it would consent to the Court's entry of final  
18 orders disposing of these matters, while Opperwall indicated that  
19 he would not so consent. After review and consideration, the Court  
20 continues to believe that the question of this Court's judicial  
21 power to enter final orders is complex in these matters, and has  
22 determined to style its disposition of these matters as a final  
23 order, for at least two reasons. First, Opperwall, the party who  
24 indicated that he would not consent to this Court's entry of a  
25 final order, or orders, never addressed the question of this  
26 Court's judicial power with respect to these matters, but merely  
27 made the blanket assertion that this Court lacked jurisdiction to  
28 entertain these matters for any purpose. The Court disposes of  
that assertion in Section II.A, *infra*. Second, as explained in  
greater depth at Section II.C below, though the parties disagree as  
to the level of factual difference between suits for the purpose of  
claim preclusion, in applying that doctrine the Court does not  
believe that it is making any findings of disputed facts—rather,  
the Court is determining that the "new facts" and "new parties"  
alleged by Opperwall, and that he believes take this new action out  
of the realm of claim preclusion, are simply not relevant to the  
claim preclusion analysis as a matter of law. Therefore, the  
disposition of this matter does not raise any issues respecting  
findings of disputed facts that, were this Court to treat this  
matter as one in which it lacked judicial power to enter a final  
order, would require a reviewing court to apply a less deferential  
standard of review concerning any such findings. *Executive*  
*Benefits Life Ins. Agency, Inc. v. Arkinson (In re Bellingham Ins.*  
*Agency, Inc.)*, 573 U.S. 25 (2014); see BLR 8003-1. In any event,  
if any party asserts that the Court lacked the judicial power to  
enter a final order on some or all of these matters, and does not  
consent to the Court's entry of an order, the party should act in  
accordance with the procedures set forth in BLR 8014-1, and urge

1 **I. BACKGROUND**

2 Because the disposition of these matters is dictated primarily  
3 by the past actions of the parties in Opperwall's now-completed  
4 chapter 13 case (the "Bankruptcy Case"), and the prior state court  
5 action that was removed to this Court, and the Court's prior  
6 determinations with respect to those matters, the relevant  
7 background to this case is largely a procedural history.

8 **A. The Chapter 13 Case**

9 On February 11, 2012, Opperwall filed a petition for chapter  
10 13 bankruptcy relief, commencing the Bankruptcy Case. Bankruptcy  
11 Case, Docket No. 1. Creditor BANA filed a proof of claim in the  
12 aggregate amount of \$952,133.91, representing amounts due under a  
13 note secured by a first priority deed of trust against Opperwall's  
14 residence. Bankruptcy Case, Proof of Claim No. 13. The Proof of  
15 Claim further specified that Opperwall's regular monthly payments  
16 were \$5,933.27 per month, and that there were aggregate pre-  
17 petition arrears of \$59,720.94.

18 On April 14, 2012, Opperwall submitted an amended chapter 13  
19 plan (Bankruptcy Case, Docket No. 32). The plan proposed monthly  
20 mortgage payments of \$2,724.66 per month, and explained that the  
21 lower monthly payments were part of a loan modification to be  
22 obtained pre-confirmation:

23 This plan assumes that Debtor will obtain, prior to  
24 confirmation of this plan, a loan modification agreement  
25 on the first mortgage on Debtor's principal residence  
26 which allows Debtor to pay \$2,724.66 per month to pay the  
monthly payments obligations which come due each month  
for the entire 60 month duration of this plan.

27 the reviewing Court to treat the Court's findings of fact and  
28 conclusions of law as proposed findings and conclusions.

1 Bankruptcy Case, Docket No. 46. Opperwall did not provide any  
2 further explanation or background regarding his belief (or  
3 assumption) that a loan modification would be obtained prior to  
4 plan confirmation. The Court, hearing no objections from BANA  
5 regarding plan treatment, entered a Signed Order Confirming Chapter  
6 13 Plan ("Confirmation Order"). Bankruptcy Case, Docket No. 71.  
7 Thereafter, Opperwall made payments according to his confirmed  
8 plan.

9 **B. Bank of America's Motion to Dismiss Chapter 13 Case**

10 On August 15, 2014, almost two years after entry of the  
11 Confirmation Order, BANA filed a Motion to Dismiss Opperwall's  
12 Bankruptcy Case ("Motion to Dismiss Case"), based on Opperwall's  
13 failure to make the contractual monthly mortgage payments of  
14 \$5,933.27. Bankruptcy Case, Docket No. 91. While acknowledging  
15 that Opperwall had been paying \$2,724.66 per month to BANA as  
16 required by his confirmed plan, BANA denied having agreed to a pre-  
17 confirmation loan modification -- and therefore alleged a massive,  
18 and growing, default by Opperwall that, per BANA, required  
19 dismissal of the Bankruptcy Case. On October 16, 2014, this Court  
20 denied the Motion to Dismiss Case, finding that (1) the confirmed  
21 plan required only monthly payments of \$2,724.66 to BANA during the  
22 course of the plan; and (2) the plan, which was appropriately  
23 noticed to creditors (including BANA), bound all creditors upon  
24 confirmation, during the pendency of the Bankruptcy Case. The  
25 Court also noted, however, that the plan did not, by its terms,  
26 appear to create a loan modification between Opperwall and BANA, or  
27 in any way modify BANA's underlying claim. The Court also rejected  
28

1 any argument that BANA's acceptance of reduced payments called for  
2 under the plan constituted a loan modification. Therefore, the  
3 Court also noted that while dismissal of the Bankruptcy Case would  
4 not be appropriate, the effect of the reduced plan payments,  
5 without any adjustment of BANA's claim, would be to create a large  
6 deficiency with which Opperwall would have to contend at the end of  
7 his plan.

8 **C. The First Adversary Proceeding**

9 On September 29, 2014, while consideration of BANA's Motion to  
10 Dismiss Case was pending but that motion had not been determined,  
11 Opperwall commenced a civil action in California state court  
12 against BANA. Contrary to the matter of fact and simple language of  
13 his confirmed bankruptcy plan, Opperwall's state court claim  
14 asserted that BANA had in fact agreed to give Opperwall a loan  
15 modification prior to his filing for bankruptcy relief. Opperwall  
16 further asserted that BANA's failure to comply with the agreed-upon  
17 loan modification and subsequent initiation of foreclosure  
18 proceedings, contrary to their alleged agreement, had forced  
19 Opperwall to file for bankruptcy relief. Opperwall also asserted  
20 that he "established and documented the modification agreement"  
21 between himself and BANA in his initial chapter 13 case filings,  
22 and sought unspecified damages from BANA for its alleged breach of  
23 this agreement.

24 On October 29, 2014, BANA timely removed Opperwall's state  
25 court action to this Court, First AP, Docket No. 1, and answered  
26 Opperwall's complaint. First AP, Docket No. 4. On December 1,  
27 2014, Opperwall filed a Motion to Abstain and Remand the Adversary  
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1 Proceeding on the basis that the state court claims were non-core  
2 and that the Court lacked jurisdiction to hear the claims. First  
3 AP, Docket No. 10. On January 20, March 11, April 7, and April 15,  
4 2015, the Court conducted hearings on the matter with multiple  
5 supplemental briefs filed by both parties in the interim,  
6 addressing, principally, the Court's jurisdiction to adjudicate  
7 matters in the First AP, the nature of the claims asserted in the  
8 First AP (including whether the claims were pre-petition or post-  
9 petition claims) and the potential preclusive effect of the  
10 Confirmation Order in the Bankruptcy Case.

11 On May 8, 2015, pursuant to the discussions in the hearings  
12 referenced in the preceding paragraph, and essentially at the  
13 direction of the Court, Opperwall filed a Memorandum Attaching  
14 Proposed/First Amended Complaint ("Amended Complaint"). First AP,  
15 Docket No. 44. On October 14, 2015, at the conclusion of another  
16 hearing, the Court denied Opperwall's Motion to Abstain or Remand.  
17 First AP, Docket No. 47. At this hearing, the Court also deemed  
18 Opperwall's Amended Complaint to be the operative complaint for the  
19 purposes of the First AP, and set a schedule for BANA to file  
20 either a motion to dismiss or a motion for summary judgment. On  
21 October 21, 2015, the Court entered an Order Denying Motion to  
22 Remand Action to Superior Court of Alameda County ("Order Denying  
23 Motion to Remand"), enumerating the actions taken at the October 14  
24 hearing. First AP, Docket No. 48. Shortly thereafter, BANA filed  
25 a Motion to Dismiss the Adversary Proceeding on the grounds that  
26 the Confirmation Order and underlying plan precluded Opperwall's  
27 state law claims. First AP, Docket No. 49.

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1       As previously indicated, a substantial portion of the  
2 discussion at the hearings conducted prior to Opperwall filing the  
3 Amended Complaint focused on the nature of the claims he was  
4 asserting, i.e., were the claims entirely pre-petition (in which  
5 case it appeared that claim preclusion based on plan confirmation  
6 could apply), post-petition (in which case the claims *might not*  
7 have been subject to claim preclusion, and might or might not have  
8 been property of the estate), or some combination thereof. The  
9 uncertainty about these issues arose, in the Court's view,  
10 primarily from the exceedingly vague and conclusory factual  
11 statements set forth in the original complaint in the First AP.  
12 Thus the main purpose of the Amended Complaint, from the Court's  
13 perspective, was to provide greater specificity concerning the  
14 operative facts, and to clarify the timing of the facts that gave  
15 rise to the allegations that there had been an agreement between  
16 Opperwall and BANA concerning a loan modification, such that the  
17 Court could determine whether a defense based upon the preclusive  
18 effect of confirmation of the plan in the Bankruptcy Case would be  
19 available.

20       Unfortunately, in the Court's view, the Amended Complaint  
21 neither added significant detail nor provided needed clarity  
22 concerning whether any portion of Opperwall's claims might have  
23 been based upon post-petition actions by BANA. Based on the  
24 Court's understanding of the Amended Complaint, Opperwall was  
25 continuing to assert a pre-petition claim that was neither disposed  
26 of in his favor (i.e., by the creation of a loan modification via  
27 the confirmed plan) nor preserved in his confirmed plan.

1 Therefore, on December 16, 2015, the Court entered an Order  
2 Granting Motion to Dismiss the Adversary Proceeding on the basis of  
3 claim preclusion. First AP, Docket No. 65. See *United Student Aid*  
4 *Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) (finding a confirmed  
5 chapter 13 plan which was not appealed was final as to issues which  
6 could have been challenged prior to confirmation); *Lomas Mortgage*  
7 *USA v. Wiese*, 980 F.2d at 1284 (9th Cir. 1992), *vacated on other*  
8 *grounds*, 508 U.S. 958 (1993) ("An order confirming a Chapter 13  
9 plan is res judicata as to all justiciable issues which were or  
10 could have been decided at the confirmation hearing.").

11 Opperwall appealed the Court's Order Denying Motion to Abstain  
12 or Remand and the Court's Order Granting Motion to Dismiss the  
13 Adversary Proceeding to the District Court.<sup>3</sup> In his Appellant's  
14 Opening Brief, Opperwall asserted that the Bankruptcy Court erred  
15 when it denied his Motion to Abstain or Remand because the Court  
16 lacked any jurisdiction over the matter. District Court Appeal,  
17 case #3:16-cv-00106, Docket No. 12. Opperwall argued the Court  
18 erred in granting the Motion to Dismiss the Adversary Proceeding  
19 because the matter of whether a loan modification occurred pre-  
20 confirmation was actually res judicata against BANA due to BANA's  
21 failure to object to his proposed chapter 13 plan prior to entry of  
22 the Confirmation Order. In fact, much of his brief is devoted to  
23 his assertion that BANA's failure to object to the chapter 13 plan

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24  
25 <sup>3</sup>Because Opperwall appealed two Orders of the Court, the  
26 District Court assigned each appeal a separate case number, 3:16-  
27 cv-00106-JST and 3:16-cv-00134-JST. Because the documents in each  
28 case are identical, and the appeals were disposed of as a single  
case containing multiple arguments by both parties and the District  
Court, this memorandum refers to both appeals as one, and  
references the lower case number.

1 proved a loan modification was in place. Further, he asserted the  
2 Motion to Dismiss the Adversary Proceeding was untimely since BANA  
3 had answered his original complaint prior to filing the Motion to  
4 Dismiss the Adversary Proceeding.

5 On November 7, 2016, the District Court affirmed the Court's  
6 Orders in a published opinion. *Opferwall v. Bank of Am., N.A.*, 561  
7 B.R. 775 (N.D. Cal. 2016). First, on the Order Denying Motion to  
8 Abstain or Remand, the District Court made clear that the Court had  
9 "related to" jurisdiction and did not err in denying remand to  
10 California state court. Second, on the Order Granting Motion to  
11 Dismiss, the District Court enumerated the factors of claim  
12 preclusion, and found this Court was correct in dismissing  
13 Opferwall's complaint on the grounds that his attempted state court  
14 suit, and any argument regarding a pre-confirmation loan  
15 modification, was barred by claim preclusion. Third, on the  
16 timeliness of the Motion to Dismiss, the District Court affirmed  
17 that the Motion to Dismiss was timely after this Court deemed  
18 Opferwall's Amended Complaint to be the operative complaint in the  
19 First AP prior to BANA's Motion to Dismiss.

20 Opferwall then appealed the District Court's decision to the  
21 Ninth Circuit Court of Appeals, which also affirmed both Orders in  
22 an unpublished two-page decision. *Opferwall v. Bank of Am., N.A.*,  
23 727 F. App'x 329 (9th Cir. 2018). The Ninth Circuit Court's  
24 decision dealt directly with the issue of this Court's jurisdiction  
25 in rejecting Opferwall's appeal of the Order Denying Motion to  
26 Remand, finding that under *In re Wilshire Courtyard*, 729 F.3d 1279  
27 (9th Cir. 2013), the Bankruptcy Court had related to jurisdiction  
28

1 over Opperwall's complaint because there was a close nexus between  
2 Opperwall's Amended Complaint and Opperwall's chapter 13 plan. The  
3 Ninth Circuit also found that by his own pleadings to the District  
4 Court arguing the merits of claim preclusion against BANA,  
5 "Opperwall waived any challenge to the bankruptcy court's  
6 determination that the Chapter 13 plan has preclusive effect on all  
7 issues that he could have raised before confirmation, including the  
8 existence and scope of a loan modification." *Opperwall*, 727 F.  
9 App'x at 329-30 (citing *United States v. Kama*, 394 F.3d 1236, 1238  
10 (9th Cir. 2005)).

11 **D. The Second Adversary Proceeding**

12 After the dismissal of the First AP, Opperwall completed his  
13 bankruptcy plan and received a discharge in May 2017. Bankruptcy  
14 Case, Docket No. 126. Just over a year later, in June 2018,  
15 Opperwall filed another state court complaint against BANA ("Second  
16 Complaint"), asserting the same basic operative facts and legal  
17 theories as his first state court complaint: that at some point  
18 (Opperwall fails to mention his Bankruptcy Case in his new  
19 complaint), BANA agreed to a loan modification, the terms of that  
20 loan modification coming into effect beginning in March 2012, one  
21 month after Opperwall's unmentioned bankruptcy filing. In his  
22 Second Complaint Opperwall added as defendants BANA's Chief  
23 Executor Officer Brian T. Moynihan, and the law firm and individual  
24 attorneys who represented BANA in the First AP: Severson & Werson,  
25 P.C., David E. Pinch, and Mark Joseph Kenney. The Second Complaint  
26 also asserted a spoliation claim regarding evidence BANA allegedly  
27 tampered with in the course of the First AP.

28

1           BANA removed the Second Complaint to this Court and promptly  
2 moved to dismiss on the basis of claim preclusion ("Motion to  
3 Dismiss"). Second AP, Docket No. 9. Opperwall filed a Cross-  
4 Motion by Plaintiff to Remand and or Abstain ("Motion to  
5 Remand/Abstain"), arguing that because Opperwall's chapter 13 plan  
6 had been completed, the Court lacked any jurisdiction to hear the  
7 matter. Second AP, Docket No. 13. Opperwall also filed a  
8 Plaintiff's Objections to Defendants' Rule 12(b)(6) Motion to  
9 Dismiss [Motion Not Timely Served, Court Lacks Jurisdiction]  
10 ("Objection"). Second AP, Docket No. 11. The Objection asserted  
11 that the Motion to Dismiss was defective due to improper service.  
12 The Objection further argued that the Court should treat any  
13 refiled Motion to Dismiss as a motion for summary judgment, and  
14 allow parties to conduct discovery before rendering a decision.

15           On August 8, 2018, the Court held a hearing, first addressing  
16 Opperwall's Objection. The Court found adequate notice was  
17 provided under the Court's Bankruptcy Local Rules and overruled the  
18 Objection. The Court then asked for further briefing regarding the  
19 Court's jurisdiction to hear BANA's Motion to Dismiss. The Court  
20 was concerned whether it had jurisdiction to determine matters in  
21 the Second AP, in light of the fact that the basis for the Court's  
22 jurisdiction was not evident from the matters asserted in the "well  
23 pleaded complaint," but arose solely from a defense set forth in  
24 the response to the complaint. See *Rivet v. Regents Bank*, 522 U.S.  
25 470 (1998) (specifically discussing the limits of "arising under"  
26 jurisdiction in bankruptcy and the well-pleaded complaint rule, a  
27 rule in which federal subject matter jurisdiction must be evident  
28

1 from the initial complaint and it is not sufficient to find federal  
2 jurisdiction for removal purposes only from affirmative defenses).  
3 In addition, the Court was concerned whether its jurisdiction to  
4 consider matters set forth in the Second AP would be affected by  
5 the fact that Opperwall had at this point completed his chapter 13  
6 plan and received a discharge. In posing these questions, the  
7 Court attempted to make clear that it had not concluded that it  
8 lacked jurisdiction to hear the Second AP, but was asking the  
9 parties for more thorough discussion of a gating jurisdictional  
10 question, using *Rivet* as a starting point for research purposes.

11 In that subsequent briefing, BANA argued that *Rivet* was not  
12 apposite, because the focused exclusively on the Bankruptcy Court's  
13 "arising under" jurisdiction -- which may be the most fundamental  
14 basis for federal court jurisdiction of bankruptcy cases and  
15 proceedings, but is not the sole source of jurisdiction over  
16 proceedings in a bankruptcy case. Second AP, Docket No. 42.  
17 Rather, as BANA argued, in bankruptcy matters, federal courts also  
18 exercise "arising in" and "related to" jurisdiction, and BANA  
19 asserted that the matters set forth in the Second AP unquestionably  
20 invoked the Court's "related to" jurisdiction. Further, BANA  
21 asserted that there is a "close nexus" between the Second AP, the  
22 First AP, and the Bankruptcy Case, since the outcome of both the  
23 First AP and the Second AP necessarily depend on the Court's  
24 interpretation of the confirmed plan from the Bankruptcy Case.

25 In his supplemental briefings, Opperwall never addressed  
26 "related to" jurisdiction, choosing to rely on *Rivet*'s "arising  
27  
28

1 under" analysis as the sole basis why this Court did not have  
2 jurisdiction over the Second AP. Second AP, Docket Nos. 44, 46.

## 3 **II. DISCUSSION**

4 After review and consideration, the Court concludes that the  
5 central question in this dispute is the Court's jurisdiction to  
6 decide matters set forth in the Second AP. As will be explained  
7 below, although Opperwall filed a Motion to Remand/Abstain, the  
8 pleading did not in fact apply the statutory requirements relevant  
9 to abstention or remand -- rather that Motion merely set forth  
10 Opperwall's challenge to the Court's jurisdiction since he had  
11 received a discharge after plan completion. Beyond that obvious  
12 "pleading" issue, the Motion to Remand/Abstain fails for two  
13 reasons. First, for the reasons set forth in Section II.A, *infra*,  
14 the Court agrees that it has at least "related to" jurisdiction to  
15 determine the matters set forth in the Second AP. Second, for the  
16 reasons set forth in Section II.B, *infra*, Ninth Circuit case law  
17 makes it abundantly clear that in the context of actions removed  
18 from state courts, the abstention doctrine and analysis simply does  
19 not apply.

20 Having made these determinations, the dispositions of the  
21 Motion to Dismiss and the Motion for Sanctions follow quite easily.

### 22 **A. Jurisdiction**

23 The Court has related to jurisdiction over the Second AP. A  
24 bankruptcy court has jurisdiction over civil proceedings  
25 (1) arising under title 11, (2) arising in title 11, or (3) related  
26 to title 11. 28 U.S.C. § 1334(b). In this case, as both the  
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1 District Court and the Ninth Circuit found in the First AP, this  
2 Court maintains related to jurisdiction.

3 In *Wilshire Courtyard*, the Ninth Circuit affirmed "that a  
4 close nexus exists between a post-confirmation matter and a closed  
5 bankruptcy proceeding sufficient to support jurisdiction when the  
6 matter affects the interpretation, implementation, consummation,  
7 execution, or administration of the confirmed plan." *In re*  
8 *Wilshire Courtyard*, 729 F.3d. at 1289 (internal quotations  
9 omitted). In that case, a confirmed plan allowed for a portion of  
10 debt to be forgiven. Post-confirmation, however, the California  
11 Franchise Tax Board attempted to recharacterize certain discharged  
12 debts as a disguised sale with resulting capital gains. The Ninth  
13 Circuit Court of Appeals agreed that the bankruptcy court had  
14 related to and ancillary jurisdiction to reopen the bankruptcy case  
15 and resolve the dispute, because there was a close nexus between  
16 the dispute and the confirmed plan, and that resolution of the  
17 dispute required interpretation of the bankruptcy plan and  
18 confirmation order.

19 Here, Opperwall, after completion of his chapter 13 plan, has  
20 filed a state law complaint which essentially recharacterizes his  
21 plan from one which was hopeful that a loan modification would be  
22 obtained prior to confirmation, to one which, contrary to the  
23 plan's language, already had a loan modification in place.

24 Resolution of this dispute necessarily requires interpretation of  
25 the Confirmation Order, and the plan itself. A close nexus exists  
26 between Opperwall's Second Complaint, which alleges that a loan  
27 modification was obtained one month into Opperwall's bankruptcy in  
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1 March 2012, Opperwall's confirmed chapter 13 plan, the final  
2 version of which was proposed in April 2012, that "assumes, prior  
3 to confirmation, Debtor will obtain a loan modification  
4 agreement,"<sup>4</sup> and the Confirmation Order putting that plan into  
5 effect.

6 Because the Court maintains related to jurisdiction in this  
7 matter, the Court need not be concerned with the well-pleaded  
8 complaint rule. See *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 258  
9 (1992) ("The 'well-pleaded complaint' rule applies only to  
10 statutory 'arising under' cases."). Though Opperwall's complaint  
11 in the Second AP appears to attempt to skirt this Court's  
12 jurisdiction through its failure to mention that Opperwall ever  
13 filed a petition for bankruptcy relief, he alleges facts which  
14 directly relate to his Bankruptcy Case, and the still operative  
15 Confirmation Order in that case.

16 This Court concludes that under the rule established by  
17 *Wilshire Courtyard*, there is a close nexus between the Second AP  
18 and Opperwall's Bankruptcy Case. Accordingly, the Court finds it  
19 has related-to jurisdiction to decide the Motion to Dismiss, the  
20 Motion to Remand/Abstain, and the Motion for Sanctions.

21 **B. Abstention/Remand**

22 Opperwall's objection to BANA's Motion to Dismiss was brought  
23 as the Motion to Remand/Abstain. While the Court initially had  
24 questions regarding timeliness of the filing, it was allowed to  
25 continue forward after BANA filed a response.

26  
27 <sup>4</sup>As noted in Section I.B, this Court found during BANA's  
28 Motion to Dismiss Case in 2012 that the plan itself did not create  
a loan modification.

1 While he argued for abstention or remand, the only point  
2 Opperwall explicitly argued in favor of either result was  
3 jurisdictional: that the Court entirely lacked jurisdiction to  
4 hear the complaint because Opperwall had completed his plan, and  
5 there was no longer an operative bankruptcy case. The Court  
6 rejects this argument as discussed in Section II.A. Opperwall's  
7 filings never addressed the factors necessary to find either  
8 mandatory or permissive abstention was appropriate. See *Bally*  
9 *Total Fitness Corp. v. Contra Costa Retail Ctr.*, 384 B.R. 566, 570-  
10 72 (Bankr. N.D. Cal. 2008) (enumerating factors for determining  
11 whether mandatory or permissive abstention is appropriate). While  
12 Opperwall declined to address the issue of the Court's mandatory or  
13 permissive abstention, the Court noted on the record that it would  
14 be very disinclined to grant permissive abstention given the  
15 Court's extensive history with the facts of the case, and that the  
16 disposition of the Second AP appeared to turn entirely on an  
17 interpretation of orders entered in Opperwall's main bankruptcy  
18 proceeding and the First AP.

19 In addition to the problems caused by Opperwall's scant  
20 explanation for his own Motion, BANA's filings made clear the law  
21 of this Circuit is that the doctrines of remand and abstention are  
22 mutually exclusive, and given the disposition of the Second AP, the  
23 only question for the Court to consider was remand. Second AP,  
24 Docket No. 19. See *In re Lazar*, 237 F.3d 967, 981 (9th Cir. 2001);  
25 see also *TIG Ins. Co. v. Smolker*, 264 B.R. 661, 665 (Bankr. C.D.  
26 Cal. 2001) ("Sections 1334(c)(1) and 1334(c)(2) are inapplicable in  
27 actions that have been removed pursuant to 28 U.S.C. § 1452"). The  
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1 Court finds BANA's arguments on the matter persuasive, and for the  
2 reasons stated above found no reason to remand this matter to state  
3 court.

4 **C. Motion to Dismiss**

5 Having found this Court has jurisdiction over the Second AP,  
6 and having been presented with no cognizable argument to remand the  
7 matter, the Court now turns to BANA's Motion to Dismiss.

8 BANA has asked the Court to take judicial notice of the First  
9 AP and the pleadings filed therein in deciding this Motion to  
10 Dismiss, as the proceedings are essentially the same. Opperwall  
11 has argued against this request, stating the Second AP is a wholly  
12 different case because additional parties and claims have been  
13 added to his complaint, along with his chapter 13 plan having  
14 reached completion. The Court sees no reason why it cannot take  
15 notice of its own prior actions and orders, and dismisses this case  
16 on the basis that (1) the Second AP is precluded by dismissal with  
17 prejudice of the First AP; and (2) the Second AP is precluded by  
18 the confirmation of the (now completed) chapter 13 plan.

19 Res judicata, or claim preclusion, applies when there is "(1)  
20 an identity of claims, (2) a final judgment on the merits, and (3)  
21 privity between parties." *Tahoe-Sierra Pres. Council, Inc. v.*  
22 *Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003).  
23 Claim preclusion is a doctrine not of suspension, but of finality:  
24 "a judgment on the merits in a prior suit bars a second suit  
25 involving the same parties or their privies based on the same cause  
26 of action." *Parklane Hosiery Co., Inc. v. Tahoe Reg'l Planning*  
27 *Agency*, 439 U.S. 322, 326, n.5 (1979).  
28

1           **1. The Second AP Is Precluded by this Court's Dismissal**  
2           **with Prejudice of the First AP.**

3           **a. There Is an Identity of Claims Between the**  
4           **First AP and the Second AP.**

5           Oppeerwall cannot avoid claim preclusion by asserting a litany  
6 of new grounds for recovery. "Identity of claims exists when two  
7 suits arise from the same transactional nucleus of facts. Newly  
8 articulated claims based on the same nucleus of facts may still be  
9 subject to a res judicata finding if the claims could have been  
10 brought in the earlier action." *Tahoe-Sierra*, 322 F.3d at 1078.

11          The Second AP and the First AP share the same transactional  
12 nucleus of facts: in both cases Oppeerwall claims that he and BANA  
13 entered into a loan modification at some point prior to  
14 confirmation of his bankruptcy plan, he began making payments  
15 according to that loan modification in March 2012, and that BANA  
16 later breached the agreement.

17          Oppeerwall contends that because he was still making payments  
18 according to his bankruptcy plan during the pendency of the First  
19 AP, and the plan had since been completed prior to the commencement  
20 of the Second AP, that the nucleus of facts in this Second AP has  
21 somehow been transmuted into something entirely different for claim  
22 preclusion purposes. However, just as completion of the bankruptcy  
23 plan does not alter the Court's jurisdictional analysis, it does  
24 not change the underlying nucleus of operative facts between the  
25 First AP and Second AP for preclusion purposes, because the only  
26 relevant question is whether confirmation of Oppeerwall's bankruptcy  
27 plan, without either disposing of the plan modification issue in  
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1 his favor (i.e., by the plan having "created" a loan modification,  
2 an argument that every court to consider it has rejected) or having  
3 preserved the claim via a reservation, precludes later assertion of  
4 such claim. And, as every court to consider the question has  
5 ruled, it does. The fact that the plan was later completed changes  
6 nothing in this analysis. Opperwall is, and always will be,  
7 precluded from asserting a claim against BANA based on his theory  
8 of a pre-confirmation loan modification.

9 That there is a spoliation "claim" tacked onto the complaint  
10 in the Second AP also makes no difference in finding an identity of  
11 claims between the First AP and the Second AP. Because spoliation  
12 is not a cause of action under California law, but rather a remedy  
13 for proven wrongful acts taken during discovery, it is subject to a  
14 motion to dismiss for failure to state a cause of action. *Cedars-*  
15 *Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 17 (1998). For  
16 similar reasons, assertion of such a legally insufficient and  
17 irrelevant "claim" cannot "change" the operative facts relevant to  
18 a determination of this matter.

19 **b. There Is a Final Judgment on the Merits of the**  
20 **Second AP's Claims.**

21 This Court dismissed with prejudice the claims of the First  
22 AP. "An involuntary dismissal generally acts as a judgment on the  
23 merits" for purposes of claim preclusion. *In re Schimmels*, 127  
24 F.3d 875, 884 (9th Cir. 1997). This Court's decision to dismiss  
25 the First AP with prejudice was affirmed on appeal by the District  
26 Court and by the Ninth Circuit. *Opperwall v. Bank of Am., N.A.*,  
27 727 F. App'x 329 (9th Cir. 2018); *Opperwall v. Bank of Am., N.A.*,  
28

1 561 B.R. 775 (N.D. Cal. 2016), and Opperwall's requests for a  
2 rehearing and a rehearing en banc were denied. *Opperwall v. Bank*  
3 *of Am.*, N.A. 2018 BL 304821 (9th Cir. Aug. 23, 2018).

4                   **c. The Alleged Addition of Parties in the Second**  
5                   **AP Does Not Destroy Privity.**

6           As to Opperwall and BANA, named parties in both actions, this  
7 Court finds identity of parties for claim preclusion purposes  
8 without need for further discussion. Opperwall's addition of  
9 BANA's Chief Executive Officer ("CEO") and the law firm and  
10 attorneys who defended BANA in the First AP as defendants in the  
11 Second AP fails to break the link of privity of parties between the  
12 proceedings. "Even when parties are not identical, privity may  
13 exist if there is substantial identity between parties, that is,  
14 when there is sufficient commonality of interest." *Tahoe-Sierra*,  
15 322 F.3d at 1081 (internal quotations omitted). Further, privity  
16 is found between a corporate party and individually named agents of  
17 the corporate party when the allegations against the individuals  
18 "relate to actions taken in their official, rather than their  
19 individual, capacities." *Pedrina v. Chun*, 97 F.3d 1296, 1302 (9th  
20 Cir. 1996).

21           Brian Moynihan is named in his individual capacity in the  
22 Second AP, but the claim only includes actions he would have  
23 undertaken as the CEO of BANA. The Court finds sufficient  
24 commonality of interest between the CEO of BANA, and BANA itself,  
25 to establish privity for claim preclusion purposes.

26           The Court notes that Opperwall's complaint does not allege  
27 with any specificity any causes of action against Severson &  
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1 Werson, P.C., David Pinch, or Mark Kenney, aside apparently, from  
2 the spoliation claim, which as noted above, is not a cognizable  
3 cause of action, and must be dismissed under Bankruptcy Rule  
4 7012(b)(6) in any event. Even so, as other courts within this  
5 Circuit have found, "when a law firm defendant appears in a  
6 subsequent action by virtue of their activities as representative  
7 of a party in a prior action, privity exists." *Hansen v. U.S.*  
8 *Bank, N.A.*, 2015 WL 5190749 (D. Idaho). While the Court finds no  
9 need to find privity as to the Severson defendants based on  
10 Opperwall's defective pleading, privity would also be found as to  
11 the Severson defendants as the Court is forced to conclude, with no  
12 further clarification from Opperwall, that they are named in this  
13 action by virtue of their representation of BANA in the First AP.

14 **2. The Second AP Is Precluded by this Court's**  
15 **Confirmation of Opperwall's Chapter 13 Plan.**

16 Despite Opperwall's failure to mention he had ever filed for  
17 bankruptcy relief in the past, the Second AP is precluded also by  
18 this Court's Confirmation Order in Opperwall's Bankruptcy Case.  
19 "An order confirming a Chapter 13 plan is res judicata as to all  
20 justiciable issues which were or could have been decided at the  
21 confirmation hearing." *Lomas Mortgage USA v. Wiese*, 980 F.2d at  
22 1284 (9th Cir. 1992). Just as the Court found in the First AP,  
23 Opperwall is again attempting to assert a claim that BANA has  
24 breached a pre-petition loan modification that was barred by this  
25 Court's confirmation of a chapter 13 plan -- which expressly did  
26 not create, but merely contemplated, some future loan modification.  
27 Opperwall failed to preserve any claim against BANA through an  
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1 express reservation of the claim in his chapter 13 plan, filing an  
2 objection to BANA's filed Proof of Claim, or filing an adversary  
3 proceeding asserting the claim against BANA. The doctrine of claim  
4 preclusion simply bars Opperwall from attempting to litigate claims  
5 he could have raised prior to confirmation of his chapter 13 plan.

6 That Opperwall's plan has since been completed and a discharge  
7 received does not nullify the preclusive effect of the plan. A  
8 confirmed chapter 13 plan permanently modifies the obligations  
9 between a debtor and creditor. 11 U.S.C. § 1327(a); *United Student*  
10 *Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). Opperwall's  
11 version of bankruptcy, in which the effects of bankruptcy are only  
12 binding during the pendency of the case, is simply contrary to the  
13 purpose of the bankruptcy system, and antithetical to the theme of  
14 finality that is central to the doctrine of claim preclusion.

15 **D. Sanctions**

16 BANA requests sanctions under the provisions of Rule 9011 in  
17 the amount of \$13,246, comprised of attorneys' fees for filing the  
18 pleadings responding to the Second AP. BANA's request is premised  
19 on three theories: (a) assertion of the Second AP is not warranted  
20 by law, since it describes essentially the same facts as the First  
21 AP, which this Court dismissed, with prejudice, on claim preclusion  
22 grounds (and which disposition was affirmed by the District Court  
23 and the Ninth Circuit); (b) the Second AP lacks evidentiary  
24 support, such that assertion of the claims therein cannot have been  
25 made after a good faith inquiry regarding the legal and factual  
26 support thereof; and (c) under the facts and circumstances of this

1 matter, Opperwall is not asserting the Second AP for a proper  
2 purpose, but rather for the purpose of harassment.

3 Opperwall filed a Memorandum of Points and Authorities in  
4 Opposition to Defendants' Motion for Sanctions under Rule 9011  
5 ("Opposition to Motion for Sanctions"), asserting that (a) Rule  
6 9011, and Federal Rule of Civil Procedure 11 from which it derives,  
7 do not apply to state court actions removed to a federal court, (b)  
8 the claims set forth in the Second AP are not frivolous, in support  
9 of which Opperwall attempts to characterize certain comments made  
10 by the Court at the August 8 hearing on the Motion to Dismiss as  
11 supporting the validity of the claims in the Second AP, and (c)  
12 Rule 9011 is not applicable, because the state court action that  
13 has been removed, asserts proper and viable and "unique" (i.e., not  
14 previously asserted) state court claims that should be tried to a  
15 jury in that forum. Second AP, Docket No. 35. For the reasons set  
16 forth below, the Court grants the Motion for Sanctions.

17 Rule 9011 reads, in pertinent part:

18 (b) By presenting to the court (whether by signing,  
19 filing, submitting, or later advocating) a petition,  
20 pleading, written motion, or other paper, an attorney or  
21 unrepresented party is certifying that to the best of the  
22 person's knowledge, information, and belief, formed after  
23 a reasonable inquiry under the circumstances, --

22 (1) it is not being presented for any improper  
23 purpose, such as to harass or to cause  
24 unnecessary delay or needless increase in the  
25 cost of litigation;

24 (2) the claims, defenses, and other legal  
25 contentions therein are warranted by existing law  
26 or by a nonfrivolous argument for the extension,  
27 modification, or reversal of existing law or the  
28 establishment of new law;

26 (3) the allegations and other factual  
27 contentions have evidentiary support, or, if  
28 specifically so identified, are reasonably based  
on a lack of information and belief.

1 Any attorney (or unrepresented filer) who files a pleading or  
2 asserts a position attests, either through the signing of the  
3 pleading or the assertion of a legal position, that he has  
4 investigated and satisfied himself that sufficient factual grounds  
5 and sufficient legal grounds exist for the positions asserted.  
6 Rule 9011(b). In assessing liability under Rule 9011, courts are  
7 directed to examine the matter under an objective standard of  
8 reasonableness measured by the actions of "a competent attorney  
9 admitted to practice before the involved court." *In re Blue Pine*  
10 *Grp.*, 457 B.R. 64 (9th Cir. BAP 2011) (*vacated in part for other*  
11 *reasons by In re Blue Pine Grp.*, 526 F. App'x 768 (9th Cir. 2013))  
12 (*quoting In re Grantham Bros.*, 922 F.2d 1438, 1441 (9th Cir.  
13 1991)).

14 The purpose of the Rule is to ensure the integrity of the  
15 judicial process, by rendering pleadings, etc., not based on valid  
16 factual and legal bases subject to sanctions, including an award of  
17 attorneys' fees to counsel who must oppose the defective pleadings.  
18 *Id.*

19 Because of the serious remedies imposed for a violation of  
20 Rule 9011, subsection (c) of the Rule requires that the party  
21 asserting a violation comply with safe harbor provisions that  
22 provide advance notice to respondents. Although the Court was  
23 initially concerned that BANA had not complied with this advance  
24 notice requirement, because the Court had not seen on the docket a  
25 declaration in support of the Motion with the form of warning cover  
26 letter that might typically accompany the advance service of the  
27 Motion, the Court is convinced after further review, that the  
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1 Motion was served with the requisite advance notice. Second AP,  
2 Docket No. 23. And, in any event, Opperwall has not contended that  
3 he was not provided the advance notice that the Rule requires.

4 **1. Rule 9011 Applies to Actions Removed from State**  
5 **Court.**

6 Opperwall spends most of his Opposition to Motion for  
7 Sanctions arguing that Rule 9011 does not apply to actions  
8 initially filed in state court and removed to federal court.  
9 Opperwall cites the case *Hurd v. Ralph's Grocery Co.*, 824 F.2d 806,  
10 808 (9th Cir. 1987) for the proposition that actions filed  
11 initially in state court and removed to federal court simply do not  
12 trigger the provisions of Rule 9011, because in such instances  
13 there is no initiating pleading that was "filed" in federal court.  
14 Opperwall further contends that, in any event, there can be no Rule  
15 9011 violation where the respondent immediately requests that the  
16 federal court abstain from hearing the removed action, or requests  
17 that the federal court remand the action to state court.

18 BANA correctly notes, however, that the version of Rule 9011  
19 that the court reviewed in *Hurd* is not the same version of the Rule  
20 in effect today. Rule 9011 was indeed amended in 1993 and is now  
21 triggered by an attorney or an unrepresented party "presenting to  
22 the court (whether by signing, filing, submitting or later  
23 advocating) a petition, pleading, written motion or other paper."  
24 Rule 9011(b). It is thus no longer the case that Rule 9011 may be  
25 triggered solely by the filing of a pleading in a federal court,  
26 and the holding of *Hurd* that a state court action removed to  
27 federal court will not invoke the provisions of Rule 9011 is simply  
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1 no longer applicable. *Buster v. Greisen*, 104 F.3d 1186 (9th Cir.  
2 1997) (*overruled on other grounds by Fossen v. Blue Cross & Blue*  
3 *Shield of Montana, Inc.*, 660 F.3d 1102 (9th Cir. 2011)).

4 And, judged by the broader language of the current version of  
5 the Rule, which may be implicated by "signing, filing, submitting,  
6 or later advocating" a pleading or other paper lacking factual  
7 support or valid legal authority, there is little question but that  
8 Opperwall's actions in this matter would invoke Rule 9011, and  
9 require compliance with its requirements. Opperwall asserts that  
10 he essentially took no action in this matter, but immediately  
11 requested that the Court either abstain or remand the matter back  
12 to state court, and that this case thus stands in stark contrast to  
13 *Buster*, cited above, in which the parties briefed and argued a  
14 motion for summary judgment. However, Opperwall, via his  
15 Opposition to the Motion to Dismiss, and via his Motion for  
16 Abstention/Remand, has asserted throughout this stage of this  
17 litigation that his action was viable, presented "unique" claims  
18 compared to the First AP, and could only be decided by a jury in  
19 state court. Such actions, manifested by numerous pleadings signed  
20 by Opperwall, obviously invoke both the "signing, filing [and]  
21 submitting" and the "later advocating" categories of activities  
22 that are subject to the Rule. *Id.* at 1190, n.4.

23 Rule 9011 unquestionably applies to Opperwall's actions in  
24 this matter.

1                   2.    The Second AP Presents Claims That Are Not Warranted  
2                            by Law and Are Legally Frivolous.

3           The filing of the Second AP violates the provisions of Rule  
4 9011, for several reasons.

5           As an initial matter, the doctrine of claim preclusion applies  
6 to bar the assertion of the claims in the Second AP, just as it did  
7 to bar the claims in the First AP. As is set forth in greater  
8 detail in Section II.A, *supra*, there is no legally significant  
9 difference between the claims asserted in the First AP and the  
10 claims asserted in the Second AP. Both actions are based upon an  
11 alleged agreement between Opperwall and BANA to modify the terms of  
12 Opperwall's secured debt to BANA, prior to the commencement of  
13 Opperwall's Bankruptcy Case. That the Second AP was brought after  
14 the completion of Opperwall's chapter 13 plan does not alter the  
15 claim preclusive effect of plan confirmation in Opperwall's chapter  
16 13 case. As the Court has noted, claim preclusion is a doctrine of  
17 finality, not suspension. *Federated Dept. Stores, Inc. v. Moitie*,  
18 452 U.S. 394, 398 (1981) (finding "the very purpose" of claim  
19 preclusion is to protect the finality of judgments). If claim  
20 preclusion exists, it bars the assertion of claims that were or  
21 could have been brought in the prior action, and it does not lapse  
22 because of the passage of time or the completion of chapter 13  
23 plans. This point is simply not subject to serious debate, and  
24 Opperwall has provided no competent authority to suggest that claim  
25 preclusion would not apply to the Second AP.

26           Nor does Opperwall's head-in-the-sand studious avoidance of  
27 even mentioning his Bankruptcy Case in the complaint commencing the  
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1 Second AP, or his allegation that the violation of the alleged  
2 agreement to modify the loan first occurred on a date that happens  
3 to have been after the date of completion of his purposefully not-  
4 identified chapter 13 plan, change the result -- though it is  
5 indicative of Opperwall's desperation to avoid the obvious legal  
6 conclusion, i.e., that the Second AP is just as claim barred as the  
7 First AP.

8 Nor for the reasons stated in the discussion of the Motion to  
9 Dismiss are any of the other alleged differences between the First  
10 AP and the Second AP, i.e., adding the CEO of BANA, and the law  
11 firm that represented BANA in the First AP as well as two lawyers  
12 who then worked at that law firm as defendants, and attempting to  
13 state a cause of action for "spoliation" of evidence, availing to  
14 Opperwall; such "differences" are simply not legally significant in  
15 the application of the doctrine of claim preclusion. The claims in  
16 the First AP and the Second AP are, for claim preclusion purposes,  
17 the same. Further, this Court has already ruled that any action  
18 based upon an alleged pre-confirmation agreement would be barred by  
19 claim preclusion. Assertion of the claims in the Second AP is not  
20 merely barred by confirmation of the chapter 13 plan, it is  
21 explicitly barred by an Order of this Court, the effect of which  
22 Opperwall is only too well aware, having attempted, for years, to  
23 have that Order reversed. Under the circumstances presented it is  
24 inconceivable that Opperwall could offer any factual or legal  
25 support for the assertion that the claims in the Second AP were not  
26 subject to preclusion, and he has totally failed to do so. The  
27 assertion of a claim that the movant knows is barred, without any

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1 excusing circumstances, is by definition made without an adequate  
2 factual or legal basis. *Stewart v. Am. Int'l Oil & Gas Co.*, 845  
3 F.2d 196, 201 (9th Cir. 1988).

4           **3. This Court's Comments During the August 8 Hearing on**  
5           **the Motion to Dismiss Do Not Indicate That the**  
6           **Claims in the Second AP Were Not Frivolous.**

7           Oppeerwall attempts to argue that the fact that this Court  
8 engaged in a fairly lengthy colloquy with counsel during the August  
9 8 hearing on this matter negates the possibility that assertion of  
10 the Second AP was frivolous. But Oppeerwall's recollection of the  
11 dialogue between the Court and counsel during that hearing is  
12 inaccurate, and fails to take account of the context of the Court's  
13 comments.

14           The Court did engage counsel in a colloquy concerning issues  
15 related to the Court's jurisdiction over the removed Second AP and  
16 whether remand might be required. But the Court went to great  
17 pains to make clear that its concerns were not a "ruling," but  
18 merely a request that the parties consider, and brief, the question  
19 whether the Supreme Court case *Rivet v. Regions Bank of Louisiana*,  
20 522 U.S. 470 (1998), posed any obstacle to the Court's exercise of  
21 jurisdiction over the Second AP, in light of the fact that, because  
22 Oppeerwall avoided mentioning his Bankruptcy Case in the complaint,  
23 the claims in that suit did not indicate a basis for federal  
24 jurisdiction. At the same time, the Court expressly noted that a  
25 number of other cases post-*Rivet* had held that *Rivet* applied only  
26 to limit the exercise of this Court's "arising under" jurisdiction,  
27 and did not affect the Court's exercise of "related to"  
28 jurisdiction. The Court also expressly noted that the Ninth

1 Circuit case of *In re Wilshire Courtyard*, 729 F.3d 1279 (9th Cir.  
2 2013) had supplied a basis for the Court's "related to"  
3 jurisdiction over the First AP; however, the Court was concerned  
4 that the completion of the chapter 13 plan, and the termination of  
5 Opperwall's Bankruptcy Case, might lessen the possibility that  
6 there would be a "close nexus" between the confirmed plan in  
7 Opperwall's main chapter 13 case and the Second AP. The Court  
8 therefore asked the parties, out of what was probably an excess of  
9 caution, to brief directly the question of this Court's  
10 jurisdiction over the removed Second AP.

11 The Court having reviewed the parties' further briefing of the  
12 issue (and in particular BANA's supplemental Brief/Memorandum in  
13 Support of Court's Jurisdiction, Second AP, Docket No. 42), the  
14 Court was satisfied that, pursuant to numerous authorities cited by  
15 BANA, it had "related to" jurisdiction over the Second AP, for the  
16 same reasons that it had such jurisdiction over the First AP: that  
17 there was a close nexus between the confirmation of the chapter 13  
18 plan and the assertion of the claims in the Second AP. And, as set  
19 forth in BANA's brief, and as became apparent to the Court upon a  
20 re-reading of the Ninth Circuit's opinion in *Wilshire Courtyard*,  
21 that case stands for the proposition that the existence of a "close  
22 nexus" between a confirmed plan and a dispute about the effect of  
23 confirmation does **not** depend upon whether the Debtor is still  
24 performing under the plan. *Id.* at 1287. Rather the close nexus  
25 need not depend on a functional analysis based on the pendency of  
26 the plan, but continues, based upon the relationship of the issues  
27 implicated in confirmation and the current dispute. *Id.*

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1 And in any event, the Court was careful to distinguish the  
2 issue of which court might have jurisdiction to rule on the Motion  
3 to Dismiss, from the **merits** of the Motion to Dismiss. Indeed, the  
4 Court remarked on several occasions during the argument that the  
5 merits of the Motion to Dismiss seemed quite obvious to the Court:  
6 claim preclusion should apply to bar the Second AP for the same  
7 reason that it had applied to the First AP. The Court said nothing  
8 to indicate that it was uncertain whether claim preclusion should  
9 apply to the Second AP. Opperwall's argument that this Court  
10 apparently viewed his arguments as warranted by law and non-  
11 frivolous is simply not accurate.

12 **4. Under an Objective Review of the Facts and**  
13 **Circumstances, the Court Must Conclude that the**  
**Second AP was Brought for an Improper Purpose.**

14 Rule 9011(b) prohibits the filing or submitting of any  
15 pleading, or later advocating any position, for an improper  
16 purpose, including to harass or to cause unnecessary delay or  
17 needless increase in the cost of litigation. The Court is to  
18 determine the applicability of this provision based on an  
19 assessment of whether a party's pleading or position is objectively  
20 reasonable, as measured by what would be expected of a competent  
21 attorney admitted to practice before the court. *In re Blue Pine*  
22 *Grp.*, 457 B.R. 64 (9th Cir. BAP 2011).

23 Considering the circumstances of this matter, including the  
24 fact that, while appearing pro se, Opperwall is a licensed  
25 attorney, and in particular the extensive prior litigation with  
26 respect to an essentially identical series of claims, that  
27 established beyond cavil that the type claims asserted in the  
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1 Second AP would be barred by claim preclusion, the Court has little  
2 choice but to conclude that the Second AP was not brought for a  
3 proper purpose. As the Court has noted in several instances in  
4 this Memorandum, this is a rare case in which claim preclusion  
5 appears to apply on two levels: first, because the claims asserted  
6 in the Second AP are clearly based upon a pre-petition agreement,  
7 and they are barred by confirmation of the chapter 13 plan in the  
8 main case; and second because the Court has already expressly ruled  
9 on the very same issue in this very case. There simply cannot be  
10 any rational and genuine argument, with this background, that a  
11 party could have an objective belief, grounded in facts and with a  
12 valid legal basis, that the assertion of the claims in the Second  
13 AP was not barred. And the fact that Oppewall apparently sought  
14 to evade the review of this Court by filing his action in state  
15 court and neglecting even to mention in the Second AP that he had  
16 been a debtor in a bankruptcy case simply reinforces the Court's  
17 belief that the Second AP could not have been filed for a proper  
18 purpose.

19 Based on the foregoing analysis, which provides ample basis to  
20 dispose of these matters, the Court will decline to reach the  
21 issues of issue preclusion and lack of a factual basis for the  
22 claims asserted in the Second AP, which were also asserted in the  
23 Motion for Sanctions.

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1                   5.     The Court Is Inclined to Award Sanctions in the Form  
2                   of Attorneys' Fees as Requested by BANA but Will  
3                   Permit Opperwall to File a Brief Addressing the  
                    Amount of Fees to be Awarded.

4             During the September 5 hearing on these matters, the Court  
5 questioned whether BANA had provided sufficient information to  
6 support its sanction request of \$13,246 in attorneys' fees for  
7 filing the Motion to Dismiss and the Motion for Sanctions, and for  
8 opposing the Motion to Abstain/Remand. The Court indicated that it  
9 would review the pleadings supplied by BANA and if it found the  
10 pleadings insufficient to support the Motion for Sanctions it would  
11 request further briefing or factual support for that request.

12            The Court, having now reviewed again the Motion for Sanctions  
13 and accompanying declarations, is convinced that those pleadings  
14 supply ample support for the fees requested. In particular, the  
15 Court believes that the hourly rate requested with respect to the  
16 fees incurred, \$375, is quite reasonable in light of the level of  
17 experience and sophistication of BANA's counsel in this matter.  
18 Similarly, the Court believes that the overall time spent on these  
19 matters, approximately 35 hours in total, is reasonable in light of  
20 the work required and the time entries provided demonstrate that  
21 the fee request appears to be comprised of entries for services  
22 that were actually and necessarily performed in connection with  
23 BANA's efforts to resist prosecution of the Second AP.

24            Moreover, the Court cannot help but note that when offered  
25 opportunity during oral argument to object to the amount of fees  
26 sought by BANA as a sanction against him, Opperwall essentially  
27  
28

1 demurred, for reasons that were not immediately apparent to the  
2 Court.

3       Nonetheless, because the Court indicated some uncertainty as  
4 to the completeness of BANA's presentation on fees, thereby perhaps  
5 creating the impression that Opperwall might have another  
6 opportunity to oppose the amount of fees sought in the Motion for  
7 Sanctions, the Court will delay entering an order granting the  
8 Motion for Sanctions for ten (10) days, to permit Opperwall to file  
9 an opposition to the amount of fees requested (but not to whether  
10 the Motion for Sanctions was well taken -- it was). The Court will  
11 then rule on the amount of fees to be awarded pursuant to the  
12 Motion for Sanctions, without further hearing.

13       For the sake of judicial economy only, the Court will delay  
14 entering orders granting the Motion to Dismiss and denying the  
15 Motion to Remand/Abstain for ten (10) days, and enter an order on  
16 all Motions on the same day. Prior thereto, the Court will not  
17 entertain any pleadings regarding any motion other than a potential  
18 filing from Opperwall on the narrow question of the amount of fees  
19 requested by BANA.

20                   **\*END OF MEMORANDUM\***

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